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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ELEAZOR RENTERIA MAGANA,

Defendant and Appellant.

F062493

(Super. Ct. No. SUF30503)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2005, appellant Eleazor Renteria Magana, committed a drive-by shooting that killed the mother of his intended victim. A jury found him guilty of murder (Pen. Code, § 187),¹ two counts of attempted murder (§§ 664/187), shooting at an inhabited dwelling (§ 246) and discharging a firearm from a motor vehicle (former § 12034, subd. (c)). The jury also found true two special circumstances: murder committed by means of discharging a firearm from a motor vehicle with intent to cause death (§ 190.2, subd. (a)(21)), and intentional murder while an active participant in a criminal street gang (§ 190.2, subd. (a)(22)) as well as all the enhancements: personal discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)); personal use of a firearm (§ 12022.5, subd. (a)(1)); discharging a firearm causing great bodily injury or death (§ 12022.55); and commission of the offenses for the benefit of, in association with, or at the direction of a criminal street gang (§ 186.22, subd. (b)(5)).

Magana hired new counsel who filed a motion for new trial. In 2011, the prosecution agreed to vacate the convictions and Magana withdrew the new trial motion and pled guilty to one count of second degree murder, with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754, 758), which generally allows the court to consider the facts of dismissed charges in sentencing. At sentencing, the court imposed the indicated sentence of 15 years to life and, over Magana's objection, a gang registration requirement.

The sole issue on appeal is whether the order to register as a gang member is supported by the evidence. We affirm.

FACTS

Gang Evidence

At trial, two gang experts testified that the Surenos are a criminal street gang associated with the Mexican Mafia prison gang. Their members identify with the number

¹ Further statutory references are to the Penal Code.

13 and the color blue. In Atwater, where the crimes occurred, Sureno gang members predominate. The Nortenos are a rival criminal street gang that identifies with the Nuestra Familia prison gang. Norteno gang members wear red and their symbols are the letter “N” and the number 14. A subset of the Nortenos, the Livas Locos, has about 150 members and is the predominate gang in Livingston, where Magana lived. There has been ongoing violence between the Atwater Sureno and the Livingston Norteno gangs. The primary activities of the Livas gang are threats, robbery, drug sales and drive-by shootings.

At the time of the shooting, Magana was an active member of the Livas gang. He had “Livas” tattooed on his chest and “1Norteno4” tattooed on the back of his neck. The intended victim, Santiago Perez, was a member of the South Side Locos, a Sureno gang. The expert opined, in response to a hypothetical question, that the drive-by shooting was gang related.

The Crimes

On the evening of August 9, 2005, Magana, Arturo Ortiz and Jose Alvarez “rapped” about Alvarez’s brother “Rooster,” who had been killed by a Sureno gang member in 1999. Magana had been with Rooster at the time. Later that night, they drove in Alvarez’s truck to Atwater to meet some girls. Magana brought an SKS semi-automatic assault rifle “because of gangs.” When the men arrived in Atwater, the girls they were to meet canceled so the men turned around to return to Livingston.

As they drove on Fir Avenue in Atwater, they saw Santiago Perez and Marcos Robles sitting in the front yard of a house. One of them “threw the 1-3,” a Sureno gang sign. The three men in the truck drove by Perez’s residence again and screamed, “Norte,” “Livas catorce,” and “[w]e’ll be back.” The truck turned around again and on the final pass, Magana fired ten shots out the front passenger window at the men in the yard and at the house.

Perez ran behind the house and was not injured. His mother, who was inside the house putting something in the refrigerator, was hit and killed. Perez told a responding officer his mother was shot by “Livas” from Livingston. After the shooting, Magana told an acquaintance the shooting was revenge for Rooster.

The trial court, in ordering Magana to register as a gang member, stated that it sat through the three-week plus trial and “the facts in this case were interwoven with allegations of gang conduct and gang events. So, therefore, the Court in its discretion will impose ...a registration under [section] 186.30.”

DISCUSSION

Magana contends there is insufficient evidence to support the trial court’s finding that his offense was “gang related” within the meaning of section 186.30, so the order directing him to register as a gang member must be reversed. We disagree.

Section 186.30, subdivision (b)(3) provides that any person convicted in a criminal court for “[a]ny crime that the court finds is gang related at the time of sentencing” must register as a gang member with local law enforcement.

A court may not find a crime to be gang related based only on the defendant’s criminal history and gang affiliation. (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761.) A crime is “gang related” within the meaning of section 186.30, subdivision (b)(3) if it is related to a criminal street gang. (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 940-941 (*Jorge G.*)). Section 186.22 defines a “criminal street gang” as any ongoing association or group of three or more persons, having as one of its primary activities the commission of one or more criminal acts enumerated in the statute, and having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. (§ 186.22, subd. (f).) A gang engages in a “pattern of criminal gang activity” when its members participate in two or more specified criminal offenses that are committed within a certain time frame on separate occasions, or by two or more persons. (*Id.*, subd. (e);

People v. Loeun (1997) 17 Cal.4th 1, 4.) These criminal offenses are referred to as “predicate offenses.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, fn. 1.)

The two or more predicate offenses need not be gang related and there is no need to establish that they were committed for the benefit of, at the direction of or in association with a gang. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 621-622.) Further, the statute does not require that the two or more persons committing the predicate crimes be gang members at the time the offenses were committed. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 375.)

Standard of Review

When considering a challenge to the sufficiency of the evidence to support a “gang related” finding for registration purposes, we review the entire record in the light most favorable to the judgment to determine whether there is evidence that is reasonable, credible, and of solid value supporting each element of gang relatedness. (*Jorge G., supra*, 117 Cal.App.4th at p. 944.)

Predicate Offenses

To establish the predicate offenses, the prosecution introduced certified copies of abstracts of judgment proving six felony convictions of five different defendants who, the expert witness opined, were Livas gang members at the time of Magana’s trial. The offenses: robbery, carrying a concealed and loaded firearm, assault with a firearm, criminal threats, assault by force likely to cause great bodily injury and attempted murder, occurred in 1999, 2000, 2002 and 2004.

Magana contends this evidence was insufficient without additional evidence that each defendant was a member of the Livas Locos on the date he committed the predicate offense. Magana cites no authority for this argument other than *Jorge G.*, where the court found insufficient evidence to order gang registration where the evidence showed only one predicate offense. (*Jorge G., supra*, 117 Cal.App.4th at pp. 945-946.) Moreover, Magana ignores *People v. Augborne, supra*, 104 Cal.App.4th at page 375, which

expressly held that section 186.22 did not require the prosecutor to prove that the individuals who committed the predicate crimes were gang members at the time the offenses were committed. (Accord, *Fellows v. Dexter* (C.D.Cal. 2008) 551 F.Supp.2d 969, 981 [none of the elements of the gang enhancement statute require the two or more persons committing the two predicate crimes be gang members at the time the offenses were committed].)

Considered together, the expert's testimony and the abstracts of judgment constitute substantial evidence of "two or more" predicate offenses that occurred after the effective date of the statute and "the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons" (§ 186.22, subd. (e).) Accordingly, substantial evidence supports the trial court's finding that Magana's offense was "gang related" within the meaning of the registration statute.

Because we conclude the evidence of the six prior crimes constitutes substantial evidence of two or more qualifying predicate offenses to establish a pattern of criminal gang activity, we need not consider Magana's alternate claim that the evidence was insufficient to establish that his accomplices, Ortiz and Alvarez, were gang members so that their concurrent offenses constituted the additional predicate offense to his own.

DISPOSITION

The judgment is affirmed.

Franson, J.

WE CONCUR:

Dawson, Acting P.J.

Kane, J.